

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In Case No. 2007-0048, In re Estate of Frederick W. Whittemore, the court on December 26, 2007, issued the following order:

The petitioner, Alison Hersey, appeals from an order of the Hillsborough County Probate Court (Cloutier, J.) ruling that the testator, Frederick W. Whittemore, did not have the testamentary capacity to execute his will of May 29, 2001, and that his will was a product of undue influence. We affirm.

On appeal, the petitioner argues that the probate court used an improper standard for assessing testamentary capacity, and that its rulings that: (1) the testator did not have testamentary capacity to execute his will; (2) the testator was unable to remember his wife was deceased; and (3) the will was a product of undue influence, were either unsupported by the evidence or erroneous as a matter of law. We address each issue in turn.

The petitioner first contends that the probate court did not apply the proper standard for determining whether the testator had testamentary capacity to execute his will in 2001. The trial court's decision to apply a particular legal standard is a question of law which we review de novo. Town of Hinsdale v. Town of Chesterfield, 153 N.H. 70, 72 (2005).

The standard for testamentary capacity requires that the testator:

at the time of making [his will], must have been able to understand the nature of the act [he] was doing, to recollect the property [he] wished to dispose of and understand its general nature, to bear in mind those who were then [his] nearest relatives as such, and to make an election upon whom and how [he] would bestow the property by [his] will

In re Estate of Washburn, 141 N.H. 658, 661 (1997) (quotation omitted). The petitioner contends that the probate court did not apply this standard. In its order, however, the probate court quoted this very language and then applied it in making its determinations. Therefore, we conclude that the probate court applied the correct legal standard.

The petitioner next contends that the trial court's ruling that the testator did not possess testamentary capacity was unsupported by the evidence or clearly erroneous as a matter of law. The petitioner alleges that the testimony of the witnesses present at the testator's will-signing ceremony sufficiently demonstrates that the testator possessed proper testamentary capacity.

The findings of fact of the judge of probate are final unless they are so plainly erroneous that they could not reasonably have been made. RSA 567-A:4 (2007). We will not disturb the probate court's decree unless it is unsupported by the evidence or plainly erroneous as a matter of law. In re Estate of King, 151 N.H. 425, 428 (2004). We review the record of the proceedings before the probate court to determine if the findings, as made by the probate judge, could be reasonably made, given the testimony presented. Id. at 428-29. In reviewing this record, we are guided by the rule that the trier of fact is in the best position to measure the persuasiveness and credibility of evidence and is not compelled to believe even uncontroverted evidence, and we defer to the trial court's judgment on such issues as resolving conflicts in the testimony, measuring the credibility of witnesses, and determining the weight to be given evidence. Id. at 429.

The record demonstrates that the testator, at the time of his will-signing ceremony, was afflicted with severe Alzheimer's dementia, very recently failed to recognize his grandchildren, could not remember that his wife was deceased, and was unable to remember that he had been away from his nursing home after returning from his trip to his will-signing ceremony. Further, one of the respondent's expert witnesses, the testator's doctor, testified that the testator lacked testamentary capacity.

Given the testator's inability to recognize members of his own family and inability to remember his wife's death, it is clear that the testator was unable to "bear in mind those who were then [his] nearest relatives" in accordance with the standard for testamentary capacity. Estate of Washburn, 141 N.H. at 661. Therefore we find that the probate court's ruling that the testator lacked testamentary capacity was reasonably made based upon the record.

The petitioner contends that the probate court's finding that the testator was unable to remember that his wife was deceased was unsupported by the evidence. However, many witnesses, including the petitioner, testified to the testator's inability to remember that his wife was deceased. Given this testimony, the probate court's finding that the testator could not remember that his wife was deceased could reasonably have been made.

The petitioner's final issue on appeal is that the trial court's finding that the will was the product of undue influence is unsupported by the evidence or clearly erroneous as a matter of law. The petitioner contends that while she, as the testator's daughter, had a confidential relationship with the testator, there is no evidence that she exercised influence to induce him to change his will.

Whether undue influence exists is a question of fact to be determined based upon the surrounding facts and circumstances. In re Estate of Cass, 143 N.H. 57, 61 (1998). The influence that a donee exerts over a donor must

amount to force or coercion that alters the donor's will and must be more than the mere influence of affection. Id. In cases where the donee acts in a fiduciary capacity to the donor, the donee has the burden of proving an absence of undue influence. Id.

The record reveals that, at a time when the testator's mind was extremely weak due to his severe Alzheimer's syndrome, the petitioner wrote a letter to the testator's attorney requesting the will change that left the majority of the testator's assets to her upon his death. The petitioner was the only person that the testator's attorney contacted regarding the changes, and he did not discuss the new will with the testator until the petitioner dropped the testator off to sign it.

By that time, the petitioner had taken control of the testator's financial matters and he was dependent upon her for transportation, finances, banking services, payment of bills, writing of letters, and his healthcare. The testator's mind was so weak that he was unable to remember that his wife was deceased and he could not recognize his grandchildren. At times, he was confused as to where he was or how long he had been there. While the petitioner states that the testator had approved the changes to his will, she herself testified that two years earlier, before his disease had progressed, the testator was unable to recall events from a day earlier. Further, the petitioner had previously manipulated other transactions regarding the testator's property in her favor. Based upon these facts, we conclude that the probate court's ruling that the testator's will of 2001 was the product of undue influence was reasonably made based upon the record.

Affirmed.

DALIANIS, GALWAY and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**